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No. 91-1160

In The

Supreme Court of the United States

October Term, 1992

A. J. ARAVE, WARDEN,

Petitioner,

v.

THOMAS E. CREECH,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITIONER'S BRIEF ON THE MERITS

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QUESTIONS PRESENTED FOR REVIEW

1. Is Idaho's statutory aggravating factor which authorizes the death penalty for murders committed with utter disregard for human life unconstitutionally vague because the limiting construction of this factor announced by the Idaho Supreme Court does not require that the factor be defined with reference to the occurrence of specifically defined acts?

2. May a United States Court of Appeals vacate a death sentence by interpreting a state statute to require a sentencing judge to make an express finding of the existence of particular factual components of a statutory aggravating circumstance?

3. When a death sentence is vacated by a state appeals court to correct a procedural defect of state law, does the Constitution require that sentencing proceedings be reopened to receive evidence of a prisoner's post-sentencing conduct in prison?

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CONSTITUTIONAL AND STATUTORY PROVISIONS

The Eighth Amendment to the Constitution of the United States, provides in pertinent part:

> " . . . nor cruel and unusual punishment inflicted."

Title 28, § 2254(a), United States Code, provides, in pertinent part:

> [A] circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a state court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

Idaho Code § 19-2515 provides, in pertinent part:

> (c) Where a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless the court finds at least one (1) statutory aggravating circumstance. Where the court finds a statutory aggravating circumstance the court shall sentence the defendant to death unless the court finds that mitigating circumstances which may be presented outweigh the gravity of any aggravating circumstance found and make imposition of death unjust.
>
> (d) In all cases in which the death penalty may be imposed, the court shall, after conviction, order a presentence investigation to be conducted according to such procedures as are prescribed by law and shall thereafter convene a sentencing hearing for the purpose of hearing all relevant evidence and arguments of counsel in aggravation and mitigation of the offense. At

such hearing, the state and the defendant shall be entitled to present all relevant evidence in aggravation and mitigation. Should any party present aggravating or mitigating evidence which has not previously been disclosed to the opposing party or parties, the court shall, upon request, adjourn the hearing until the party desiring to do so has had a reasonable opportunity to respond to such evidence. Evidence admitted at trial shall be considered and need not be repeated at the sentencing hearing. Evidence offered at trial but not admitting may be repeated or amplified if necessary to complete the record.

(e) Upon the conclusion of the evidence and arguments in mitigation and aggravation the court shall make written findings setting forth any statutory aggravating circumstance found. Further, the court shall set forth in writing any mitigating factors considered and, if the court finds that mitigating circumstances outweigh the gravity of any aggravating circumstance found so as to make unjust the imposition of the death penalty, the court shall detail in writing its reasons for so finding.

(f) Upon making the prescribed findings, the court shall impose sentence within the limits fixed by law.

(g) The following are statutory aggravating circumstances, at least one (1) of which must be found to exist beyond a reasonable doubt before a sentence of death can be imposed:

. . .

(6) By the murder, or circumstances surrounding its commission, the defendant exhibits utter disregard for human life.

(7) The murder was one defined as murder of the first degree by section 18-4003, Idaho Code, subsections (b), (c), (d), (e) or (f), and it was accompanied with the specific intent to cause the death of a human being.

Idaho Code § 18-4003 provides in pertinent part:

(c) Any murder committed by a person under a sentence for murder of the first or second degree, including such persons on parole or probation from such sentence, shall be murder of the first degree.

. . .

(e) Any murder committed by a person incarcerated in a penal institution upon a person employed by the penal institution, another inmate of the penal institution or a visitor to the penal institution shall be murder of the first degree.

Idaho Code § 19-2827(c) provides as follows:

(c) With regard to the sentence the court shall determine:

(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and

(2) Whether the evidence supports the judge's finding of a statutory aggravating circumstance from among those enumerated in section 19-2515, Idaho Code, and

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and defendant.

STATEMENT OF THE CASE

On May 13, 1981, the respondent, Thomas Eugene Creech, who was serving sentences for first degree murder in the Idaho State Correctional Institution, murdered David Dale Jensen, another inmate. Jensen had been convicted of car theft. Sometime prior to his incarceration, Jensen had suffered a gunshot wound to the head which left him physically and mentally handicapped. Part of his brain had been removed, and he had a plastic plate in his skull. *State v. Creech*, 670 P.2d 463 (Idaho 1983), rehearing denied (1983), cert. den., 465 U.S. 1051 (1984). Creech was charged with murder in the first degree. Information, JA p. 16. Over the objection of his attorney, he entered a plea of guilty. *Creech, supra.* The court conducted a sentencing hearing at which it received evidence in aggravation and mitigation. At the conclusion of this hearing, the court took the case under advisement and later issued written findings. Creech was sentenced to death. JA pp. 31-37. In accordance with Idaho's capital sentencing statutes, see Idaho Code § 19-2515, the trial judge made findings of the existence of statutory aggravating factors. In particular, the court concluded that the defendant was under sentence for a previous murder at the time the Jensen killing occurred, that the defendant, by the murder or circumstances surrounding its commission, exhibited utter disregard for human life, that the defendant had murdered

another correctional institution inmate, and that the defendant had exhibited a propensity to commit murder which would be a continuing threat to society. Findings, JA pp. 33-34.

Creech appealed his sentence to the Idaho Supreme Court. During the pendency of the proceedings, the supreme court remanded the case to the district judge, stating in its order that Idaho Code § 19-2503, and Idaho Criminal Rule 43(a), required that sentence be pronounced in open court in the presence of the defendant and his attorney, rather than merely presented in writing. This remand was temporary. The Idaho Supreme Court retained jurisdiction and gave the judge only 14 days to carry out the order. *Creech, supra.* The trial court then pronounced judgment in Creech's presence and denied a motion by Creech's attorney to receive additional evidence in mitigation. Creech's sentence was upheld on appeal to the Idaho Supreme Court. The court concluded that the evidence supported the findings of aggravating circumstances. It rejected a claim by Creech that the utter disregard factor, Idaho Code § 19-2515(g)(6), was unconstitutionally vague. *Creech, supra.* The court pointed out that it had imposed a limiting construction on this statutory aggravating circumstance in *State v. Osborn*, 631 P.2d 187 (1981), and that the factor, as limited, was sufficiently narrow to withstand constitutional scrutiny. *Id.* Creech filed a petition for a writ of certiorari in this court, which was denied. 465 U.S. 1051 (1984).

Thereafter, Creech filed a petition for a writ of habeas corpus in the United States District Court for the District of Idaho. Petition, JA p. 77. The petition alleged, among other things, that state court had made inadequate factual

findings, petition, JA pp. 95-96, that the "utter disregard" aggravating circumstance was unconstitutionally vague, JA p. 100, and that he was not given a second meaningful sentencing hearing when the Idaho Supreme Court temporarily remanded the case to the district court. JA pp. 112-116.

The United States District Court denied relief, and Creech appealed to the United States Court of Appeals for the Ninth Circuit. His case was argued in 1988. The Court of Appeals rejected most of Creech's claims, but as to three of them, granted relief. The court held that Idaho's "utter disregard" aggravating factor was unconstitutionally vague and that the limiting construction of the Idaho Supreme Court was insufficient. *Creech v. Arave*, 947 F.2d 873 (9th Cir. 1991). The court also held that the trial judge erred by failing to find that Creech had acted with specific intent in the murder of David Dale Jensen, a component of Idaho's aggravating factor which provides that the murder of an inmate by another inmate or a murder committed by a person under a sentence of murder is a capital offense if accompanied by a showing of specific intent to kill. *Id.* Finally, the court held that *Skipper v. South Carolina*, 476 U.S. 1 (1986), entitled Creech to a second sentencing hearing when his case was temporarily remanded by the Idaho Supreme Court. The warden of the Idaho State Correctional Institution petitioned this court for a writ of certiorari, which was granted.

SUMMARY OF ARGUMENT

I. The court of appeals was in error in holding that *Walton v. Arizona*, 497 U.S. 639 (1990), requires a state to

define aggravating circumstances with reference to specific objective acts. Idaho's "utter disregard factor" refers only to the most callous and cold-blooded killings. Callousness and cold-bloodedness are not terms so subjective that they are incapable of principled application in a state's death sentencing scheme and these definitions satisfy *Walton's* requirement for narrowing in a judicial sentencing state.

(1) In addition, Idaho assigns sentencing to judges, rather than juries, subject to independent review by the Idaho Supreme Court, and it is presumed that judges are familiar with and apply the law and that state appellate courts give each defendant an individualized, reliable sentencing determination.

(2) Idaho has not only the framework for a sentencing system that avoids arbitrary and capricious results in capital cases, Idaho's courts have applied the "utter disregard" circumstance in a narrow and principled way. This factor has not been used as a "catch-all" circumstance designed to unduly broaden the availability of a sentence of death.

(3) The United States Court of Appeals for the Ninth Circuit exceeded its power to review state court judgments. It gave no credit to the independent review function of the Idaho Supreme Court and misinterpreted the trial court's factual and legal findings.

II. Whether a state court must make express findings of facts which are components of a statutory aggravating circumstance is a matter of state law. The United States Court of Appeals for the Ninth Circuit exceed the scope of federal habeas review by holding, without authority,

that the trial judge's finding that the state had proved factor (g)(7) in Idaho Code § 19-2515 (murder by an inmate or murder by one under sentence for murder) was invalid because the trial judge had not expressly found facts implicit in such a conclusion, that is, the murder was accompanied by specific intent to kill.

III. Creech's case was temporarily remanded to the district court during the pendency of his direct appeal. The remand was temporary, for the purpose of allowing the judge to correct a procedural error. Idaho law requires that sentence be pronounced in the presence of the defendant. The district court had not complied with this requirement.

The Idaho Supreme Court retained appellate jurisdiction during the remand and required the district court to act within 14 days. Creech was not, by virtue of *Skipper v. South Carolina*, 476 U.S. 1 (1986), entitled to demand a second full sentencing hearing when his case was returned to the trial court. *Skipper* applies only to questions of the relevance of the defendant's prison conduct when such evidence is offered at the defendant's original sentencing hearing. *Skipper* does not create a right to seek revision or modification of sentence whenever a prisoner might be able to produce potentially mitigating evidence of post-trial prison conduct.

ARGUMENT

I. The Idaho Supreme Court's Limiting Construction Of The State's "Utter Disregard" Aggravating Factor Is Constitutionally Sufficient; The Court of Appeals' Holding To The Contrary Is Not Consistent With This Court's Precedent.

The State of Idaho seeks to validate an important provision of its capital sentencing statutes. Idaho law

provides that in capital cases sentence is to be imposed by the trial judge, subject to independent review by the Idaho Supreme Court. Idaho Code sections 19-2515(f); 19-2827(c). The sentencing judge is empowered to impose a sentence of death in cases of first degree murder upon a finding of one or more statutory aggravating circumstances. Idaho Code 19-2515(g). One such provision of the statute authorizes a death sentence if the circumstances of the murder exhibited "utter disregard for human life." Idaho Code 19-2515(g)(6) This factor is similar in its subjective character to another which authorizes a death sentence on a finding that the murder was "especially heinous, atrocious or cruel, manifesting exceptional depravity." Idaho Code 19-2515(g)(5). Although the validity of the "utter disregard" factor has not been directly considered by this Court, the similar "heinousness" factor has been and the Court has not found it lacking solely because it cannot be applied with mathematical objectivity. *See Gregg v. Georgia*, 428 U.S. 153 (1976); *Walton v. Arizona*, 487 U.S. 639 (1990).

The Idaho Supreme Court has imposed a narrowing construction on both the "utter disregard" and "heinousness" factors. *State v. Osborn*, 631 P.2d 187 (Idaho 1981). Its construction does not make findings of the aggravating factors depend on the presence of particular facts. Instead, Idaho has chosen to rely on the ability of the sentencing judge to make principled distinctions between capital and non-capital cases with guidance that is somewhat subjective but nonetheless capable of genuinely narrowing the conditions on which the death penalty can be imposed.

In this case below, the Ninth Circuit Court of Appeals struck down Idaho's utter disregard factor on grounds that are inconsistent with *Walton* and by doing so unduly intruded on the State's power to establish and enforce penalties for criminal conduct.

A. The Court of Appeals' "Objective Standards" Requirement Mistakes The Holdings Of This Court's Cases Concerning The Sufficiency Of State Limiting Constructions And Is Inconsistent With Standards Applicable To Judicial Sentencing Systems.

The "utter disregard" and the analogous "heinousness" factors of Idaho Code 19-2515(g)(5) and (6) describe two different kinds of culpability, each of which has been legislatively identified as a sentencing factor of special importance in cases where the death penalty may be imposed.

Section (g)(5), referring to the heinousness, atrociousness or cruelty of the murder and the depravity of the act, specifically refers to the personal culpability of the killer as revealed by the manner in which the crime was committed. Thus, this factor was described in *Gregg v. Georgia*, 428 U.S. 153 (1976), as one that relates to cases where "the offense of murder was outrageously and wantonly vile, horrible and inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." The Idaho Supreme Court took the same approach to characterizing the meaning of the "heinousness" factor in *Osborn*, supra:

> What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies – the conscienceless or pitiless crime which is unnecessarily torturous to the victim. Quoting State v. Dixon, 283 So.2d 1 (Fla. 1973), *cert. den.*, 416 U.S. 943 (1974). 102 Idaho at 418.

On the other hand, the "utter disregard" factor refers not to the outrageousness of the acts accompanying the murder, but to the defendant's lack of conscientious scruples against killing another human being. See *State v. Fain*, 774 P.2d 252 (Idaho 1989). In *Osborn*, the Idaho Supreme Court construed the utter disregard factor as one referable to circumstances different from those encompassed by the "heinousness" factor of section 19-2515(g)(5):

> Since we will not presume that the legislative intent was to duplicate any already enumerated circumstance, thus making I.C. 19-2515(f) [sic] (6) mere surplusage [citation omitted], we hold that the phrase "utter disregard" must be viewed in reference to acts other than those set forth in Idaho Code §§ 19-2515 (f) [sic] (2), (3) and (4). We conclude instead that the phrase is meant to be reflective of acts or circumstances surrounding the crime which exhibit the highest, the utmost callous disregard for human life, i.e., the cold blooded, pitiless slayer. 102 Idaho at 405.

The particularly cold-blooded killer, who is typified by such offenders as the respondent Creech who kills for the sake of killing, see *State v. Creech*, 670 P.2d 463 (Idaho 1983) cert. den. 465 U.S. 1051 (1984); *State v. Card*, 825 P.2d

1081 (Idaho 1991), or who is prepared to kill without hesitation to accomplish some legally unacceptable goal, *State v. Paradis*, 676 P.2d 31 (Idaho 1983), need not act sadistically or in an especially outrageous fashion in order to commit a killing with utter disregard for human life. One who commits a murder in an especially heinous way is punished for the heinousness of the crime, not because he acted with utter disregard for human life. Although it may be expected that most especially heinous, atrocious or cruel murders will have been committed with utter disregard for human life, see, e.g., *Tison v. Arizona*, 481 U.S. 137 (1987), the converse is not always true as Creech's earlier crimes illustrate, See *Creech*, 670 P.2d at 475.

The Ninth Circuit Court of Appeals did not find that the "utter disregard" factor was wholly invalid but held instead that the Idaho Supreme Court's limiting construction gave "no more guidance than the statute." 947 F.2d at 884. This conclusion was based on the panel's inability to understand clearly "what constitutes the highest, the utmost, callous disregard for human life," the terms used by the state court to define the scope of the statutory provision. Observing that this Court had found in *Maynard v. Cartwright*, 486 U.S. 356 (1988) that the word "especially" did little to explain to a *jury* the meaning of "heinousness", the Court of Appeals concluded that it had found an applicable rationale by which *Maynard v. Cartwright* could be made to stand for the proposition that Idaho's limiting construction was not sufficient in a *judicial* sentencing setting. Because the word "especially" does not guide a jury in limiting its application of "heinousness", the court of appeals appears to have reasoned,

it follows that terms like "highest, utmost disregard for human life" and "cold-blooded pitiless slayer" could not be helpful to a legally trained sentencing judge whose responsibility is to rationally distinguish between the worst murders and those that are not quite so aggravated. This logic, unfortunately, confuses the reach of an adjective of uncertain meaning (heinousness) with that of a description of a state of mind (cold-blooded, pitiless, callous) easily understandable to a reasonable person. The court's construct suggests the unsupportable conclusion that *Cartwright* condemns all definitional usages that leave it to a sentencing judge to employ any measure of discretion in separating "ordinary" murderers from those whose crimes are so cold-blooded as to be, with reasonable consistency, found deserving of the death penalty.

Indeed, the Court of Appeals, relying on *Godfrey v. Georgia*, 446 U.S. 420 (1980), held that subjective statutory terms must be clarified by making them referable to definite acts[1] such as "torture or physical abuse" or the

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[1] Petitioner finds it difficult to understand how a court that finds unclear the meaning of the terms "cold-blooded pitiless slayer" and "utmost callous disregard for human life" nonetheless knows exactly what "infliction of mental anguish" means or is, at least, willing to accept that another court does. 947 F.2d at 884. The judges of the court of appeals who dissented from the order denying a hearing en banc had the same difficulty. As Judge Trott wrote:

> Idaho's "utter disregard" factor as focused by Osborn is indistinguishable from the aggravating circumstance approved by the Supreme Court in Walton . . . How "objective" is "relishing the murder,

(Continued on following page)

strikingly specific "infliction of mental anguish." These and similar terms were described in *Walton* as components of Arizona law with which the Arizona Supreme Court had "sought to give substance to the operative terms." *Walton*, 111 L.Ed.2d at 529. They were not identified as prerequisites to valid limitations on facially vague factors. Instead, the Court explained that a limiting definition such as that approved in Maynard v. Cartwright could not be considered the only one that would be constitutionally acceptable. The Court went on to state that it could not fault the Arizona court's limiting definition that "a crime is committed in a 'depraved' manner when the perpetrator 'relishes the murder, evidencing debasement or perversion,' or 'shows an indifference to the suffering of the victim and evidences a sense of

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evidencing debasement or perversion"? How is that different from evidencing an "utter disregard for human life," defined as intentional, cold-blooded, and without pity, and as requiring more than just mass murder, murder for hire, and endangering many people? This is not just "wicked and vile," as in Maynard v. Cartwright, 486 U.S. 356, 362 (1988), which are simply pejorative adjectives that broadly describe the crime. This is "utter, callous, cold-blooded, and pitiless disregard for human life," which is a standard that can be proved with facts and circumstances. "Cold-blooded" means carried out without feeling or emotion. "Pitiless" means without compassion for suffering. Contrary to the panel's assertion, Idaho does not call for a purely "subjective determination" of whether a defendant is a "cold-blooded, pitiless slayer." Idaho requires an evidentiary determination supported by facts and circumstances. 947 F.2d at 890, Trott, J., dissenting.

pleasure in the killing" because such definitions, though not mathematically precise, give meaningful guidance to the sentencer. *Walton, Id.* The guidance furnished by these terms is of precisely the same character as that provided by the Idaho Supreme Court's *Osborn* limiting construction. The sentencer in Arizona must look at the evidence of the defendant's acts and decide whether it furnishes a basis for the inference that the killer "relished the murder" or was "indifferent to the suffering of the victim" and "evidenced a sense of pleasure" in the killing. In the instance of Idaho's "utter disregard" factor, the sentencer must make judgments that are only semantically, but not substantively, different. "Cold-bloodedness" and "utmost callousness" cannot be more difficult to gauge accurately that "relishing" or "evidencing a sense of pleasure in killing." As Judge Trott observed, the Court of Appeals has "effectively established a standard for Idaho more exacting than the one established for Arizona." 947 F.2d at 893.

Idaho's "utter disregard" factor is not the only statutory aggravating circumstance among those being used in the States that requires the sentencing authority to make an assessment of cold-bloodedness or cold calculation. Florida authorizes the death penalty on a finding that a murder was committed "in a cold, calculated and premeditated manner without any pretense of moral or legal justification." Fla. Stat. § 921.141(5)(i). The Florida Supreme Court has interpreted the statute to require a "heightened" degree of premeditation and has upheld the factor as thus limited. *Brown v. State*, 473 So.2d 1260 (1985) (advance planning, such as in contract killings furnishes an example.) Florida's application of this factor

has been upheld by the Court of Appeals for the Eleventh Circuit, which observed that " . . . while the line between 'ordinary' premeditation and the 'heightened' cold, calculated premeditation is a thin one, petitioner has not shown that the state has applied this factor in an unconstitutionally arbitrary manner." *Harich v. Wainwright*, 813 F.2d 1082 (11th Cir. 1987). See also; *Henderson v. Dugger*, 925 F.2d 1309 (11th Cir. 1991) Florida's "cold, calculated and premeditated" factor is plainly no more objective than the "utter disregard" factor, as limited by the Idaho court. There is no reason to believe that Florida death sentencing decisions based on the factor have been systematically arbitrary.

In *People v. Lucas*, 548 N.E.2d 1003 (Ill. 1989) the Illinois Supreme Court, distinguishing *Cartwright*, held that the term "especially brutal or heinous, indicative of wanton cruelty" was sufficiently narrow because the term "especially brutal or heinous" was modified by the requirement for a showing of "wanton cruelty." These terms are surely no easier to apply than those used by the Idaho Supreme Court to limit the state's "utter disregard" factor. Moreover, Florida and Illinois use the definitions mentioned above to instruct juries rather than judges in the meaning of aggravating factors.

The Eighth Circuit has invalidated a Nebraska court's construction of one of its state's aggravating circumstances. The Nebraska Supreme Court had defined "exceptional depravity" to mean a state of mind "totally and senselessly bereft of regard for human life." The definition is comparable to utter disregard for human life viewed as objective evidence of depravity. The Nebraska limitation was held in *Moore v. Clark*, 904 F.2d 1226 (8th

Cir. 1990), cert. den. (1992) to be violative of the *Godfrey* requirement for suitable limitations on the applicability of an aggravating factor. The fault of *Moore* is that it seems to read *Godfrey*, as the Ninth Circuit did, to require the complete elimination of subjectivity in capital sentencing. The decision does not defer to the discretion left to the states to define the circumstances that will authorize the death penalty. Both *Moore* and the Ninth Circuit's decision below provide a review standard even worse in terms of subjectivity than the statutes they struck down, with the result that a subjective but workable statutory definition is invalidated by the totally subjective view of a federal court. *Moore*, it should be noted, does not discuss the Nebraska judicial sentencing system and makes no effort to reconcile its result with *Walton*.

B. Idaho's System Of Judicial Sentencing And Independent Appellate Review Provides Safeguards To Insure That Aggravating Circumstances Will Be Applied In Constitutionally Narrow Fashion.

The Court of Appeals invalidated Idaho's "utter disregard" factor by concluding that not only was the factor vaguely construed, but that a valid construction suggested by the state had not been applied. In doing so, the court apparently assumed that neither the sentencing judge nor the state supreme court was aware of the constitutional requirement for guided discretion and the body of case law that gives meaning to the requirement. The court's error is the predictable result of the fact that it

wholly overlooked *Walton's* discussion of *judicial* sentencing systems and the inapplicability of the *Godfrey/Maynard* rationale in such settings.

> When a jury is the final sentencer, it is essential that the jurors be properly instructed regarding all facets of the sentencing process. It is not enough to instruct the jury in the bare terms of an aggravating circumstance that is unconstitutionally vague on its face. That is the import of our holdings in Maynard and Godfrey. But *the logic of those cases has no place in the context of sentencing by a trial judge.* Trial judges are presumed to know the law and to apply it in making their decisions. If the Arizona Supreme Court has narrowed the definition of the "especially heinous, cruel or depraved" aggravating circumstance, we presume that Arizona trial judges are applying the narrower definition. It is irrelevant that the statute itself may not narrow the construction of the factor. Moreover, even if a trial judge fails to apply the narrowing construction or applies an improper construction, the Constitution does not necessarily require that a state appellate court vacate a death sentence based on that factor. Rather, as we held in Clemons v. Mississippi, 494 U.S. ___, (1990), *a state appellate court may itself determine whether the evidence supports the existence of the aggravating circumstance as a properly defined* or the court may eliminate consideration of the factor altogether and determine whether any remaining aggravating circumstances are sufficient to warrant the death penalty. *Walton,* 111 L.Ed.2d at 528 (emphasis added)

The possible breadth of statutory aggravating factors is not the only consideration important in evaluating the

capacity of a particular sentencing system to avoid arbitrary results. The Idaho Supreme Court has held that the state's death penalty statutes impose upon it the responsibility to independently review death sentences imposed in the trial courts of the state. In *State v. Osborn, supra,* the state's high court held that it would comprehensively review death sentences independently of errors raised on appeal and that its sentence review would not be restricted by rules generally requiring the preservation of issues in the trial court because the state's statutes compel review "irrespective of the defendant's contentions, if any." 631 P.2d at 192. The statute requires the court to consider whether the sentence of death was arbitrarily imposed, whether the evidence supports the trial court's finding of aggravating circumstances and whether the sentence of death in a particular case is excessive or disproportionate. Idaho Code § 19-2827. By rule, the court has prescribed a form to be followed by trial courts in cases where the death penalty may be authorized. The trial court is instructed to state aggravating factors found and to state the reasons why the death penalty was or was not imposed. Rule 33.1, Idaho Criminal Rules. In Creech's case the court observed that Creech experiences no remorse for his actions, had committed murder at least four times previously and had, in letters to law enforcement officials, detailed "numerous alleged murders beyond those for which he has already been convicted and . . . [his] intentions to kill in the future." *Creech,* 670 P.2d at 472. The court concluded that Creech was "remoreseless, calculating and cold-blooded." *Id.* at 476. The Court of Appeals did not credit these conclusions though *Walton* required that it do so.

The Idaho Supreme Court's independent review of capital cases is effectively *de novo* and the court considers not only whether the trial court's findings of aggravating factors are supported by sufficient evidence, but also whether to accept the penalty as proportionate and just. In *State v. Scroggins,* 716 P.2d 1152 (Idaho 1985), which concerned the senseless killing of a young girl by Scroggins and an accomplice, the court overturned Scroggins death sentence in the exercise of its power in independent review:

> Our review of a death sentence is qualitatively different than our review of an ordinary criminal sentence which is subject to review in this court on an abuse of discretion standard. [citations omitted] . . . [W]ith a death sentence I.C. § 19-2827(a) requires this court to make an independent review of the sentence on the record, and the abuse of discretion standard which otherwise applies in criminal sentencing is not applicable.
>
> . . . [W]e conclude that the sentence of death is excessive and disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.
>
> We have painstakingly considered the record, and in so doing, have focused not only on the crime and the circumstances surrounding its commission but on the age, characteristics, and personal involvement of *this* defendant. 716 P.2d at 1159.

The court found Scroggins less culpable than his accomplice, who was also sentenced to death, *State v. Beam,* 710 P.2d 526 (Idaho 1985), based on considerations such as

youthful immaturity and its view that Scroggins had not committed the acts that directly caused the child's death. In reaching this conclusion, the Idaho Supreme Court necessarily held that the sentencing judge's factual conclusions about Scroggins' personal culpability were incorrect.

Similarly, in *State v. Windsor,* 716 P.2d 1182 (Idaho 1985), the state supreme court set aside a death sentence in a case where the court found the defendant to be less culpable than her accomplice. The court found that Windsor was not the actual killer, may not have intended that the killing occur, and had no past record of violent conduct. Windsor and Donald Fetterly, see *State v. Fetterly,* 710 P.2d 1202 (1985), broke into and burglarized the home of an acquaintance. They then lay in wait for the owner to return and, when he did, tied him and Windsor placed duct tape over his face in a manner that would have caused him to suffocate had not Fetterly first stabbed him to death. Again, the Idaho Supreme Court necessarily substituted its own conclusion about the defendant's culpability for that of the trial judge.

In two cases, the Idaho Supreme Court vacated death sentences in order to obtain clarification from trial courts about the certainty of decisions in favor of the death penalty. In one case it was unclear whether the trial court would have imposed the death sentence in the absence of an erroneous factual finding supporting the "utter disregard" factor. *State v. Charboneau,* 774 P.2d 299 (Idaho 1989). In the other, the court was uncertain whether the trial judge was fully aware of his discretion *not* to impose a death penalty. *State v. Leavitt,* 775 P.2d 599 (1989), after resentencing, 822 P.2d 523 (1991) rehearing denied (1992).

In *Charboneau*, the state appellate court could probably have upheld the death sentence on the basis of remaining aggravating factors, but since it was remanding the case the court chose not to consider whether the remaining factor was supported by sufficient evidence. *Clemons v. Mississippi*, 494 U.S. 738 (1990) holds that a state reviewing court may, upon finding one of multiple aggravating factors to be deficient, either reconsider whether the factor, properly applied is sufficiently supported by the evidence or may itself determine that remaining circumstances are enough to support the death penalty. See also *Walton, supra; Cabana v. Bullock*, 474 U.S. 376 (1986). Petitioner does not understand these cases to mean that a state appellate court must either always remand or always itself independently consider the appropriateness of the death penalty when it finds a deficiency in the way sentence was imposed in the trial court. See *Sochor v. Florida*, No. 91-5843, June 8, 1992. ("While federal law does not require the state appellate court to remand for resentencing, it must, short of remand, either itself reweigh without the invalid aggravating factor or determine that weighing the invalid factor was harmless error." Slip. op. at p. 4)

State law in Idaho contemplates that where one of multiple aggravating factors fails the appellate court may remand for additional proceedings, particularly where to do so may enhance the accuracy of the sentencing process, *Charboneau, supra; Leavitt, supra; Osborn, supra*. On the other hand, if the supreme court is satisfied that nothing is to be gained by a remand, it may itself determine that the death penalty is appropriate notwithstanding that one of several aggravating factors has been called

into question. This aspect of the review process has been simplified by the court's decision in *Charboneau* which instructs sentencing judges to specify whether aggravating factors found are individually sufficient to support the death penalty. This was accomplished by requiring that all mitigation be considered against each aggravating factor found. Since *Charboneau* was decided, it has been typical for sentencing judges to state that each aggravating factor found stands alone against all mitigating evidence presented, if that is the case.

Thus, in *State v. Card*, 825 P.2d 1081 (Idaho 1991), where the sentencer had found aggravating factors of multiple murder and utter disregard for human life, the Idaho Supreme Court declined to follow the decision of the Ninth Circuit in *Creech*, finding that the multiple murder aggravating factor was sufficient by itself to sustain the death penalty. The Idaho Supreme Court did not expressly state that it had "reweighed" the remaining factor, see *Sochor*, but Idaho is not a "weighing" state as that term is defined in *Clemons v. Mississippi*, 494 U.S. 738 (1990) and it was not required to do so.

A state's decision about how its sentencing system will operate must be its own, subject to the requirement that it provide a means for distinguishing those who should be sentenced to death from those who should not. *Cabana, supra*. In this regard, as this Court has observed, it is

> important to note that state supreme courts in States authorizing the death penalty may well review many death sentences and that typical jurors, in contrast, will serve on only one such case during their lifetimes. [citation omitted]

> Therefore we conclude that state appellate courts can and do give each defendant an individualized and reliable sentencing determination based on the defendant's circumstances, his background and the crime. *Clemons*, 494 U.S. at 749.

Because Idaho's sentencing procedure includes independent review by the state supreme court, the Ninth Circuit erred by its focus on language used by the trial court in its findings, an error which implicates the power of a federal appeals court over state sentencing decisions.

C. Idaho's Courts Have Applied the "Utter Disregard" Circumstance In Constitutionally Narrow Fashion.

A different panel of the Court of Appeals has recognized that the sufficiency of a state's death sentencing procedure depends on all the circumstances relevant to the way the state administers its system.

> [In Walton] the Court held that facial vagueness alone does not decide the question: One must look beyond the language of the suspect provision and consider the full circumstances attending its application. Safeguards built into the sentencing scheme through other provisions – and even extra-statutory procedural safeguards – may preserve the scheme's constitutional integrity. *Richmond v. Lewis*, 948 F.2d 1473, 1483-1484 (9th Cir. 1992), cert. granted, 112 S.Ct. 1557 (1992).

The best evidence that Idaho's utter disregard factor is not so broad that it operates simply as a catch-all for murders not covered by other aggravating circumstances

lies in the fact that the utter disregard circumstance has been applied in a narrow, consistent fashion. In every case in which the Idaho Supreme Court has upheld a death sentence based wholly or in part on a finding of utter disregard for human life, the defendant had acted without conscientious scruple against killing. Each such murder could be characterized as cold-blooded because the defendant acted with no significant provocation, without emotion or killed for mere convenience such as to destroy a witness to a crime. For example, in *State v. Paradis*, 676 P.2d 31 (Idaho, 1983), cert. den. 468 U.S. 1220 (1984), and *State v. Gibson*, 675 P.2d 33 (Idaho 1983) cert. den. 468 U.S. 1220 (1984) (related cases), the defendants brutally murdered an acquaintance in Spokane, Washington, probably because he had questioned Gibson and Paradis about stolen guns. The victim's girlfriend, Kimberly Palmer, was present. Gibson and Paradis placed Palmer in a van, drove her into Idaho, and strangled her to death.

Both defendants were sentenced to death. The "utter disregard" factor was the only statutory aggravating circumstance found.

In *State v. Sivak*, 674 P.2d 396 (1983), the defendant entered a service station with an accomplice and murdered the attendant by stabbing and shooting her several times. Sivak had previously worked at the gas station, "was known to the victim, had expressed animosity toward her and had called to inquire who would be on duty at the station" the day of the attack. *Sivak*, 674 P.2d at 398. Sivak's act of callous, planned murder for no good reason is an objectively observable example of utmost callousness and cold-bloodedness.

The utter disregard factor has been applied to the senseless and unprovoked murder of children (*State v. Beam*, 710 P.2d 526 (Idaho 1985); *State v. Scroggins*, 716 P.2d 1152 (Idaho, 1985); *State v. Fain*, 774 P.2d 252 (Idaho 1989)), and to a child abuse murder where the defendant had previously threatened his infant victim, killed the child with injuries difficult to achieve, had previously expressed dislike for the child and was calm after the attack and refused to assist the victim, *State v. Aragon*, 690 P.2d 293 (Idaho 1984), rehearing denied (1984), but not where such evidence was lacking. *State v. Padilla*, 620 P.2d 286 (1980). In *State v. Fetterly*, 710 P.2d 1202 (Idaho 1985), rehearing denied (1986), cert. den. 479 U.S. 870 (1986), Fetterly and his girl friend waited for the victim of their crime in his home. They had broken in for the purpose of committing a burglary, but the burglary could have been quickly accomplished. When the victim returned home, he was bound, his face was covered with duct tape and he was stabbed to death by Fetterly. See also, *State v. Windsor*, 716 P.2d 1182 (Idaho 1985) (companion case). In *State v. Paz*, 798 P.2d 1 (Idaho 1990), the defendant, after a relatively minor argument in a restaurant, finished his meal, walked to his automobile and obtained a semi-automatic weapon, and returned to the restaurant where he shot into a room containing numerous people, killing the person with whom he had argued. Three cases involved casual robberies with wholly gratuitous killings of multiple victims. *State v. Pizzuto*, 810 P.2d 680 (Idaho 1991), cert. den. ___ U.S. ___ (1992); *State v. Lankford*, 747 P.2d 710 (Idaho 1987), vacated on other grounds, sub nom *Lankford v. Idaho*, 114 L.Ed.2d 173 (1991); *State v. Lankford*, 781 P.2d 197 (Idaho 1989).

In reviewing the utter disregard cases, the Idaho Supreme Court has vacated three judgments based in whole or in part of utter disregard findings. In *State v. Windsor*, 716 P.2d 1182 (Idaho 1985), and *State v. Scroggins*, 716 P.2d 1152 (Idaho 1985), the court found the sentences to be excessive even though the utter disregard factors had been proved. In *State v. Charboneau*, 774 P.2d 299 (Idaho 1989), the Idaho Supreme Court did not find that the evidence clearly supported the utter disregard finding.

That the Idaho courts have not used the utter disregard factor in an overbroad fashion is more dramatically demonstrated by the numerous cases in which, though there was an evidentiary basis for finding the factor, the death penalty was not imposed. In *State v. Searcy*, 798 P.2d 914 (Idaho 1990), the defendant carefully planned to rob a grocery store after hours. He hid himself in the back storage room of the store. When the victim went to the back room to place the day's receipts in the safe, Searcy shot her in the stomach and told her that he would call an ambulance if she opened the safe. When the victim opened the safe, Searcy put his gun to her head and killed her. Potential mitigating factors included the circumstances that the defendant was relatively young (20 years), chemically dependent, and suffered delayed growth syndrome. For a similar case, see *State v. Cambron*, 798 P.2d 469 (Id.App. 1990). In *State v. Wages*, 810 P.2d 272 (Id.App. 1991),[2] the defendant was involved in the murder of a

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[2] Cases decided by the Idaho Court of Appeals generally do not discuss the state's death penalty aggravating factors. The Court of Appeals has no jurisdiction over such cases. Nonetheless, many of the murder cases decided by the Idaho Court of Appeals are reflective of the sparing use of the utter disregard factor in Idaho law.

potential drug prosecution witness. The victim was stripped, tied to a tree, physically abused, then stabbed to death. The death penalty was not imposed on Wages. He was considered less culpable than other participants in the crime, was addicted to drugs and alcohol, seemed to be remorseful, and had cooperated with the police. In *State v. Winn*, 828 P.2d 879 (Idaho 1992), a mother who poisoned her child to death, claiming instructions from a demon, was spared the death penalty, inferably because of mitigating evidence of mental condition. Other examples of the reluctance of courts to find the utter disregard factor, or of prosecutors to press the issue, are numerous.[3]

In sum, Idaho trial courts have not applied the utter disregard factor in a broad or meaningless way. Idaho's death penalty decisions are the result of an appropriately narrow application of aggravating circumstances.

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[3] See e.g., State v. Beam, 706 P.2d 1342 (Idaho 1985); State v. Caudill, 706 P.2d 456 (Idaho 1985); State v. Bainbridge, 698 P.2d 335 (Idaho 1985); State v. Hoffman, 701 P.2d 668 (Id.App. 1985); State v. Johns, 736 P.2d 1327 (Idaho 1987); State v. Hawkins, 769 P.2d 596 (Idaho 1989); State v. Smith, 792 P.2d 916 (Idaho 1990); State v. Rodgers, 812 P.2d 1066 (Id.App. 1990); State v. Enno, 807 P.2d 610 (1991); State v. Broadhead, 814 P.2d 401 (Idaho 1991); State v. Romero, 815 P.2d 453 (Idaho 1991); State v. Major, 665 P.2d 703 (1983); State v. Griffith, 610 P.2d 522 (Idaho 1980); State v. Stormoen, 645 P.2d 317 (Idaho 1982); State v. Olin, 648 P.2d 203 (Idaho 1982); State v. Anderson, 700 P.2d 76 (Id.App. 1985); State v. LePage, 630 P.2d 674 (Idaho 1981); State v. Mitchell, 660 P.2d 1336 (1983), cert. den. 461 U.S. 934 (1983); State v. Brewer, 1992 W.J. 140939 (Id.App. 1992).

D. The Court Of Appeals Exceeded Its Power To Review State Court Judgments In Habeas Proceedings.

In the method by which the Ninth Circuit Court of Appeals reviewed the Idaho Supreme Court's determination upholding the "utter disregard" aggravating circumstance in Creech's case the court failed to recognize the limitations on its power to overrule such a determination. In *Lewis v. Jeffers*, 111 L.Ed.2d 606 (1990), this Court stated:

> Our decision in *Walton* . . . makes clear that if a state has adopted an constitutionally narrow construction of a facially vague aggravating circumstance, and if the State has applied that construction to the facts of the particular case, then the "fundamental constitutional requirement: of channeling and limiting . . . the sentencer's discretion in imposing the death penalty," Cartwright, 486 U.S., at 362, has been satisfied. 111 L.Ed.2d at 622.

Notwithstanding the constitutional sufficiency of Idaho's narrowing construction, by the rationale of *Walton*, and as tested by the manner in which the Idaho court has reviewed death sentences, the Court of Appeals held against the statute by misinterpreting the trial court's findings. It ignored altogether the independent review function of the Idaho Supreme Court. Pointing to language in the sentencing findings to the effect that the victim had initiated an attack on Creech and that the murder "evidenced an excessive violent rage," the Court of Appeals stated that it could not agree that the facts showed that Creech was a "cold-blooded, pitiless killer." 947 F.2d at 884. The court then observed that if the "utter

disregard" language was meant to apply only to calculated murders, it had been misapplied:

> In its briefs, the state argues that "utter disregard" is sufficiently specific, as it applies only to calculated murders. According to the State, "[M]urders that result from a strong provocation or objectively reasonable emotional distress are not comprehended by [the section]." If this is what the limiting construction means, then it was improperly applied to Creech. While the state argues that "Creech cold-bloodedly contrived the murder of David [sic] Jensen," this was not the finding of the trial court. . . . *Creech v. Arave*, 947 F.2d at 884-885, n.16.

And what of the determination of the Idaho Supreme Court that Creech was "remorseless, calculating and cold-blooded," had committed four previous murders, confessed to many others and announced that he intended to keep on killing in the future, 670 P.2d at 476? All reference to this holding was omitted in favor of calling attention to a non-dispositive remark by the Idaho Supreme Court that the district judge did not find that the murder had been performed on contract or by plan. 947 F.2d at 885.

The sentencing judge's findings were not as lexically precise as they might have been, but read in context they leave little doubt of his meaning. Although there was uncontradicted evidence that Creech engineered an attack on Dale Jensen in order to create a pretext for killing him, see transcript of deposition of Keith George, Exhibit E, supplemental excerpt of record, Court of Appeals; Exhibit W, supplemental excerpt of record,

Court of Appeals, pp. 79-83 (preliminary hearing transcript), Judge Newhouse listed Jensen's attack as a mitigating factor, justifying a "protective" response. Findings, JA p. 32 Even with Judge Newhouse's generous interpretation of mitigation, it was clearly his view that the murder was cold-blooded and calculated. His findings included the following:

> (a) . . . The victim was a young, inexperienced, handicapped man.[4] He had both physical and mental impairments.
>
> (c) . . . The victim, once the attack commenced was under the complete domination and control of the defendant. The murder itself was extremely gruesome evidencing an excessive violent rage.[5] *With the victim's attack as an excuse*[6], the defendant's murder then took on many of the aspects of an assassination. These violent actions went well beyond self-defense.
>
> (d) . . . The defendant indicates an intention to commit continued murders in the future, which, based on his record, is extremely probable.

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[4] Jensen was not a violent offender. He was in prison on an automobile theft conviction. State v. Creech, 670 P.2d 463 (Idaho 1983).

[5] It is apparent that the "excessive rage" language refers to the brutality of the attack. This is not inconsistent with Creech's cold-blooded disposition to kill for the sake of killing.

[6] Judge Newhouse seems clearly to have viewed the attack by Jensen as something that served Creech as a mere pretext for the killing.

> (g) . . . During the incident, the defendant was not under the influence of any mind controlling substance. The murder, once commenced, appears to have been an intentional, calculated act.
>
> Findings, JA p. 33

In concluding that the murder had been the product of utter disregard for human life, Judge Newhouse pointed out that Creech had killed his victim after he was completely helpless. Findings, JA p. 34

The Court of Appeals revision of the sentencer's findings and its failure to defer to the independent review function of the Idaho Supreme Court violate governing standards of federal review announced in *Lewis v. Jeffers, supra*. In *Jeffers* the Court held that federal review of a state court's application of a properly narrowed aggravating factor "is limited, at most, to determining whether the state court's finding was so arbitrary or capricious as to constitute an independent due process or Eighth Amendment violation." 111 L.Ed.2d at 622. To determine the issue, the Court held that the "rational fact-finder" standard of *Jackson v. Virginia*, 443 U.S. 307 (1979) would apply.

A state court's finding of an aggravating circumstance

> in a particular case – including a *de novo* finding by an appellate court that a particular offense is "especially heinous" or "depraved" – is arbitrary or capricious if and only if no reasonable sentencer could have so concluded." *Jeffers*, 111 L.Ed.2d at 624.

This principle applies equally to the application of aggravating circumstances by a sentencing judge and the determinations of a state appellate court that conducts an independent review of the evidence. In both cases "the underlying question remains the same: If a State's aggravating circumstances adequately perform their constitutional function, then a state court's application of those circumstances raises, apart from due process and Eighth Amendment concerns, only a question of the proper application of state law." *Id.*

If petitioner is correct in its position that Idaho's "utter disregard" factor has been constitutionally narrowed and applied, the Court of Appeals' judgment that the state courts misapplied the factor is a decision on a matter of state law in excess of the authority of the court. The facts of Creech's crime are such that a rational fact-finder would be obligated to conclude that he acted with utter disregard for human life.

II.

The Court of Appeals Exceeded the Scope of Federal Habeas Review By Its Holding that Creech Was Entitled to Relief Because the Sentencing Court Had Not Made Express Findings of the Existence of Particular Factual Components of a Statutory Aggravating Circumstance.

A murder committed by a person already under a sentence for murder or the murder of a prison inmate by another inmate is defined by Idaho Code section 18-4003(c) and (e) as a murder of the first degree. Such a murder is a capital offense if the state proves additionally that "it was accompanied with the specific intent to cause

the death of a human being." Idaho Code, section 19-2515 (g)(7). The sentencing judge found that this aggravating circumstance had been proved beyond a reasonable doubt. Findings, JA p. 33. Moreover, the concluding paragraphs of the judge's formal findings contained the statement that "this defendant intentionally destroyed another human being at a time when he was completely helpless." Findings, JA p. 34. The Idaho Supreme Court, in response to Creech's argument that the trial court erred in finding the aggravating circumstances beyond a reasonable doubt, held that the evidence clearly supported the trial court's findings. *Creech*, 670 P.2d at 467.

The Court of Appeals, however, held that the trial court had not made a required finding that component facts of an aggravating circumstance had been proven:

> We find that there is evidence by which Judge Newhouse could have concluded that Creech had specific intent. At the time he pleaded guilty, Creech admitted that he intended to kill Jensen. Nevertheless, Judge Newhouse's findings fail to indicate that found specific intent beyond a reasonable doubt before applying section 19-2515 (g)(7). On remand, the district court shall grant the petition. The writ shall order Creech's release if the state judge at resentencing applies the aggravating circumstances under this section without a finding of specific intent. *Creech v. Arave*, 947 F.2d at 882.

No legal rationale was offered in support of this holding, nor was any authority cited. The Court of Appeals may have thought that some unidentified federal right entitled Creech to have Judge Newhouse's intent

finding appear alongside his references to the aggravating factors found instead of on a separate page. The court may have believed that the words "intentionally destroyed" imply something different than "with intent to kill". In any case, the court was wrong. The procedure for communicating findings to a state reviewing court is a matter of state law. In an analogous situation, the Idaho Supreme Court held that it would not compel the sentencing court to make written findings explaining its application of the *Osborn* limiting construction to the "utter disregard" factor because neither *Osborn* nor the statute contained such a requirement. *State v. Sivak*, 674 P.2d 396 (Idaho 1983).

Likewise, whether a state court must make express findings of the facts implicit in a particular holding is not a question open to federal review.[7] In *Lewis v. Jeffers, supra*, the Court held that whether an aggravating circumstance exists is a question of state law, not cognizable in federal habeas courts, even if the determination could be considered a mixed question of law and fact. *Wainwright v. Witt*, 469 U.S. 412 (1985), in which it was argued that the presumption of correctness under 28 U.S.C. section 2254 did not apply to an implied factual finding of juror bias, holds that a state court is not obliged to detail for the record facts necessarily included in a holding:

> We decline to require the judge to write out in a separate memorandum his specific findings on each juror excused. A trial judge's job is difficult enough without senseless make-work. Nor do

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[7] A related issue has been raised in Richmond v. Lewis, cert. granted, No. 91-7094.

> we think under the circumstances that the judge was required to announce for the record his conclusion that juror Colby was biased, or his reasoning. The finding is evident from the record. 469 U.S. at 430.

Cf. *Knaubert v. Goldsmith*, 791 F.2d 722 (9th Cir. 1986) (Not every fact supporting a state court finding "need be stated on the record in infinite detail and clarity. In certain circumstances we will recognize that a factual determination is implicit in the actions taken by a state court.")

Judge Newhouse's finding that the (g)(7) aggravating factor of intent to kill had been proved beyond reasonable doubt necessarily implied that the component facts had been found, just as the Idaho Supreme Court's holding that the aggravating factors were supported by sufficient evidence necessarily raises the same implication. The only observable way around this implication would be to assume that the state judges might not have known what the law required, thus necessitating a direct expression capable of demonstrating to a federal court that the provisions of state law were known and had been observed. This assumption, however, is not open to a federal habeas court. *Walton, supra; Witt, supra.*

The Court of Appeals holding is little more than instruction on how the state court should have written its opinion. This Court, however, has said that it "will not impose on state courts the responsibility for using particular language in every case in which a state prisoner presents a federal claim . . . in order that federal courts might not be bothered with reviewing state law and the record in the case." *Coleman v. Thompson*, 115 L.Ed.2d 640, 662 (1991).

The Ninth Circuit was required to accord a presumption of correctness to the state factual findings, express and implicit. *Burden v. Zant*, 112 L.Ed.2d 962 (1991). It did not do so. Instead, it revised the findings by excising the sentencing court's express reference to Creech's intent to kill.

Furthermore, the Court of Appeals was required to refrain from deciding questions of state law. *Jeffers, supra; Estelle v. McGuire*, 116 L.Ed.2d 385 (1991) ("We reemphasize that it is not the province of a federal habeas court to reexamine state court determinations on state law questions." 116 L.Ed.2d at 396.) It did not do so. Instead the Court of Appeals intruded upon the State's enforcement power without even as much as a pretextual legal justification.[8]

III.

The Court of Appeals Erred By Holding That A Remand During Appeal For The Purpose of Correcting An Error Of State Procedural Law Entitled Creech To A New Sentencing Hearing.

Serious and adverse implications for the finality of judgments arise from the holding of the Court of Appeals

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[8] Although it is somewhat unclear because the Court of Appeals did not explain the legal basis for its holding, the state has assumed that the court mistakenly ruled on a question of state law rather than announcing a new rule of federal law. If the holding could be viewed as one based on federal law, it would be precluded in Creech's case by the "new rule" doctrine of Teague v. Lane, 489 U.S. 288 (1989). See also: Stringer v. Black, 117 L.Ed.2d 367 (1992).

that Creech was entitled to a second sentencing hearing when the Idaho Supreme Court temporarily remanded his case for the purpose of correcting a procedural error. See *Creech v. Arave*, 947 F.2d at 881-882.

It is important to bear in mind that Creech was afforded a full hearing on matters in aggravation and mitigation. Evidence was offered by both Creech and the State. A presentence report was prepared and submitted. The trial judge took judicial notice of the entire case file and the presentence report. *Creech*, 670 P.2d at 466. At the conclusion of these proceedings, the judge took the case under advisement and some time later executed a written document detailing the court's findings and announcing its judgment. *Id.* During the pendency of Creech's appeal in the Idaho Supreme Court, and before any action had been taken to decide the case, the court remanded the case with instructions to pronounce sentence in open court in the presence of the defendant. *Id.*, n.1 The order of remand stated that pronouncement of sentence in the absence of the defendant and his attorney violated a state statute. Order, JA pp. 38-39 The supreme court also ordered that the trial judge comply within fourteen days, which suggests that the court did not seriously expect that a new sentencing hearing would be conducted. *Id.* In the meantime, the supreme court retained appellate jurisdiction. In a footnote to its ultimate opinion, the court explained that it had remanded the case "for the imposition of such sentence as the district judge might find just and appropriate to be imposed upon Creech in open court with Creech and his counsel present," noting that Idaho Code section 19-2503 and a court rule required pronouncement of sentence in the defendant's presence. 670 P.2d at 466, n.1.

When the case was returned to Judge Newhouse, Creech demanded a new sentencing hearing, which was denied. The Court of Appeals granted relief on this ground, holding that *Lockett v. Ohio*, 438 U.S. 586 (1978), *Eddings v. Oklahoma*, 455 U.S. 104 (1982) and *Skipper v. South Carolina*, 476 U.S. 1 (1986) required that a defendant be allowed to offer mitigating evidence of his post trial behavior in confinement. 947 F.2d at 873.

Lockett and *Eddings* stand generally for the unexceptionable proposition that one accused of a capital crime must be permitted to offer all relevant evidence in mitigation at the sentencing phase of his case. *Skipper* did not alter this principle by its holding that evidence of a defendant's behavior while incarcerated awaiting trial was relevant to the question of what sentence should be imposed.[9]

The decision below cites *Skipper* for a very different principle than the case announced. *Skipper* is concerned with the relevance of the defendant's behavior in jail to the traditional sentencing issue of character. The Court of Appeals read the case to mean that Creech was entitled to demand that a *revision* of his sentence be considered because he had been incarcerated and therefore might have been able to produce evidence of his prison conduct

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[9] If the Court of Appeals decision were viewed as an extension of the precedent set by Skipper, the new rule would not be available to Creech. Teague v. Lane, supra; Stringer v. Black, supra. The court's holding, however, is not an extension of Skipper. It is a misreading of the case which is inconsistent with its rationale. The decision below, therefore, does not announce a bona fide rule at all.

capable of changing the sentencer's mind about the death sentence. If *Skipper* meant this, a capital prisoner would be entitled to insist on periodic sentencing reviews in order to present evidence of his prison conduct and it would never be possible to execute a sentence of death. The rule could not properly be limited to those fortuitous cases where the defendant is granted a hearing on some procedural ground. If there is a constitutional right to sentence reconsideration for the purpose of evaluating prison conduct, presumably its applicability could not be restricted to cases where the defendant obtains a remand for the purpose of having the sentence announced in his presence.

Skipper, however, is limited to insuring that a prisoner is entitled to present all relevant evidence at his original sentencing hearing, or in a case where he is granted a full resentencing. This was the view of the Ohio Supreme Court in *State v. Davis,* 63 Ohio St.3d 44 (1992).[10] Davis was granted a new hearing before an Ohio sentencing panel "solely for the purpose of determining whether [a] remaining aggravating circumstance outweighs the mitigating factors presented . . . beyond a reasonable doubt. *State v. Davis,* 528 N.E.2d 925, 936 (1988). Davis sought to have the panel consider evidence of his post trial prison conduct, but it refused to do so. On appeal, the Ohio Supreme Court upheld the panel decision:

> In the case at bar, no relevant mitigating evidence was excluded from consideration by the panel during the mitigation phase of appellant's

[10] A petition for a Writ of Certiorari has been filed in this Court sub nom Davis v. Ohio, No. 91-8740.

> 1984 trial. All mitigating evidence which was available at that time was duly received and considered by the panel including evidence concerning appellant's ability to adapt to prison life. That same relevant evidence was again received and considered by the panel in 1989 for purposes of resentencing appellant.[11] The evidence excluded from consideration by the panel at appellant's resentencing hearing concerned *post-trial* matters. Under these circumstances, we do not believe that *Skipper* . . . requires that appellant's death sentence be vacated. Here, appellant was not denied the type of individual consideration of relevant mitigating factors required in capital cases. 63 Ohio St.3d at 46.

Creech's theory that he *was* granted a full resentencing hearing depends on *Sivak v. State,* 731 P.2d 192 (Idaho 1986), which was decided after *Skipper* was announced and several years after Creech's appeal was decided by the Idaho Supreme Court. Although the facts of the procedurally based remand in Sivak's case were identical to those of Creech's case, Sivak was granted a new sentencing hearing. The Idaho Supreme Court held that this result was dictated by *Skipper.* Petitioner believes that the state supreme court was in error in this view, for the reasons stated above. *Sivak* does not change the fact that the Idaho Supreme Court finalized Creech's sentence.

The Court of Appeals did not base its decision on the theory that Creech was entitled to a new hearing because such relief had been granted to Sivak under the same

[11] Petitioner understands this to mean that the sentencing panel reconsidered the same evidence it had received previously. See Resp. Brief, Davis v. Ohio, No. 91-8740.

circumstances, nor could it have properly done so. See *Jeffers, supra*. (Habeas corpus does not lie to consider a claim that a state court misapplied its own law.) Instead, the court observed that it was persuaded by *Sivak* that there was "no rational basis for distinguishing the evidence of a defendant's good conduct while awaiting trial and sentencing, and evidence of a defendant's good conduct pending review of a death sentence which is vacated on appeal." 947 F.2d at 882.

Obviously there *is* a rationale basis for making such a distinction in the circumstances of this case. A right given to a defendant convicted of a capital offense to seek modification of a death sentence whenever he wishes to offer evidence of his post-sentencing behavior in jail would unacceptably undermine legitimate expectations in the finality of fully considered judgments.

CONCLUSION

Those aspects of the judgment of the Court of Appeals for the Ninth Circuit relevant to the petitioner's cause herein should be vacated.

Respectfully submitted,

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